Nos. 82-1146; 82-1147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, (AFL-CIO), and CHARLES H. PILLARD, *et al.*,
Petitioners,

v.

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITIONS OF THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC. *ET AL.* AND THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS *ET AL.*

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QUESTION PRESENTED

This case involves a horizontal agreement to affect prices in the electrical construction industry that is unique only because the illegal agreement is contained in a clear, unambiguous written document between the defendants, which is confirmed by a simultaneously executed written memorandum of understanding and interpretation of that document. The agreement constitutes a naked form of horizontal price fixing by an association of electrical contractors in combination with a union which controls the supply of electrical workers in the electrical industry. The agreement equalizes costs by placing the equivalent of substantial association dues obligations—previously required only of members of the association—upon all electrical contractors who are not members of the association. The agreement adds a cost burden upon nonmember contractors with no equivalent cost burden being placed upon member contractors. The millions of dollars to be paid by the nonmember contractors goes to the defendant contractors association with no part of those funds being paid to the union or its members. The Complaint in this action was filed on August 5, 1977 prior to any payment by any affected contractor.*

No claim was made by the defendants to the United States Court of Appeals for the Fourth Circuit that the scheme was protected either by statutory or nonstatutory labor exemption. The United States Court of Appeals for the Fourth Circuit was correct in its decision and a writ of certiorari to that court in this case is not justified.

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* The effective date of the Agreement was July 1, 1977 with the first payment due August 15, 1977. While the trial court has made no rulings on the amount of damages, defendants created their own potential damage liability with full notice of the plaintiffs' Complaint.

The question presented is:

Whether union participation in a business group's scheme to cause a cost increase in the form of a payment by non-member competitors to the business group, which payment is unrelated to wages, hours and working conditions, is price-fixing—a *per se* violation of § 1 of the Sherman Act.

PARTIES

Plaintiffs in the proceedings below included:

National Constructors Association
Commonwealth Electric Company
The Howard P. Foley Company
Donovan Construction Company of Minnesota, Inc.
Arthur McKee & Company, Inc.
Badger America, Inc.
Catalytic, Inc.
C. F. Braun Constructors, Inc.
Dravo Corporation
Guy F. Atkinson Company
The H. K. Ferguson Company
Jacobs Constructors, Inc.
Pullman Kellogg Division of Pullman, Inc.
Stearns-Roger, Inc.

Defendants in the proceedings below included:

National Electrical Contractors Association, Inc.
Robert L. Higgins
International Brotherhood of Electrical Workers
Charles H. Pillard
Colgan Electric Company, Inc.
Miller Electric Company
H. E. Autrey
Allen L. Bader
Frank H. Bertke
Donald C. Cates
Robert W. Colgan
Joe R. Devish
Carl T. Hinote
Allan H. Stroupe
L. R. McCord
Aldo P. Lero
Lowell C. Timm
John Ostrow
C. W. Stroupe
Warren Losh
J. D. Hilburn, Sr.

DISCLOSURE OF CORPORATE AFFILIATIONS

Guy F. Atkinson Company—A wholly owned subsidiary of Guy F. Atkinson Company of California, which is a publicly owned company.

Badger America, Inc.—A wholly owned subsidiary of the Badger Company, Inc. which in turn is a wholly owned subsidiary of the Raytheon Company. Raytheon Company is a publicly owned company.

Blount Brothers Corporation—Blount Brothers Corporation is a wholly owned subsidiary of Blount International Ltd. which in turn is a subsidiary of Blount, Inc. which is a publicly held company.

C. F. Braun Constructors, Inc.—A wholly owned subsidiary of C. F. Braun and Company, which in turn is a subsidiary of Santa Fe International Company, a publicly owned corporation.

Catalytic, Inc.—A wholly owned subsidiary of Air Products and Chemicals, Inc., a publicly held company.

Donovan Construction Company, Inc.—A wholly owned subsidiary of Donovan Companies, Inc. a publicly owned corporation.

H. K. Ferguson Company—A wholly owned subsidiary of Morrison-Knudson Company, Inc. which is a publicly held corporation.

Fluor Constructors, Inc.—A wholly owned subsidiary of Fluor Corporation, a publicly held company.

Jacobs Constructors, Inc.—A subsidiary of Jacobs/Wiese Constructors, Inc. which in turn is a subsidiary of Jacobs Engineering Group, Inc., a publicly held company. Other companies which are subsidiaries of Jacobs Engineering Group, Inc. but which are not wholly owned subsidiaries are: Jay Property Systems, Inc.; Jacobs Constructors of Puerto Rico, Inc.; Zellars-Williams, Inc.; Ohio-Atlas Construction Company; Quality Development Associates, Inc.;

Cameron Engineering, Inc.; Southern Instruments, Inc.; The Pace Company Consultants and Engineers, Inc.; UMC, Inc.; Jacobs International Ltd., Inc.; Allen M. Campbell Company General Contractors, Inc.; UMC of Louisiana, Inc.; and Jacobs International Ltd.

Henry J. Keiser Company—A subsidiary of Raymond Keiser Engineers, Inc. which in turn is a subsidiary of Raymond International, Inc. which is a publicly held company.

Koppers Company, Inc. Engineering and Construction Group—A wholly owned subsidiary of Koppers Company, Inc. a publicly owned corporation.

Leonard Construction Company—A wholly owned subsidiary of Monsanto Enviro-Chem Systems, Inc. which in turn is a wholly owned subsidiary of Monsanto Company, a publicly owned corporation.

Litwin Corporation—A subsidiary of AMCA International Ltd., a publicly held corporation.

Lummus Construction Company—A wholly owned subsidiary of Lummus Group, Inc. which in turn is a wholly owned subsidiary of Combustion Engineering, Inc., a publicly held corporation.

Mid-Valley, Inc.—A wholly owned subsidiary of Brown & Root, Inc. which in turn is a wholly owned subsidiary of the Holliburton Company, a publicly owned company.

Parsons Constructors, Inc.—A subsidiary of Parsons Corporation, a publicly owned company.

Procon Incorporated—A wholly owned subsidiary of Procon International, Inc. which is in turn a wholly owned subsidiary of UOP, Inc. which in turn is a wholly owned subsidiary of the Signals Companies, Inc. a publicly held corporation.

Stearns-Roger—Stearns-Roger, Incorporated is now known as The Former Stearns Roger of Colorado, Inc., which is

a wholly owned subsidiary of Stearns Roger World Corporation which in turn is a subsidiary of Air Products and Chemicals, Inc. a publicly held corporation.

Wismer & Becker Contracting Engineers—A wholly owned subsidiary of Guy F. Atkinson Company of California, a publicly owned corporation.

Dravo Corporation—A publicly held company with the following subsidiaries: Ratcliffe International Sales Company, Inc. and Holmes Company, Inc.

Kellogg-Rust Constructors, Inc.—The successor to Pullman Kellogg, Division of Pullman, Inc., is a wholly owned subsidiary of The Signal Companies, a publicly owned corporation.

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I

STATUTORY PROVISIONS

The relevant statutory provisions are:

1. Sherman Act, § 1, 15 USC § 1;
2. Clayton Act, § 16, 15 USC § 26.

Pertinent portions of these statutory provisions are reproduced in the appendix to the National Electrical Contractors Association Inc.'s, et al. Petition at pages 103a and 193a.

II

STATEMENT OF THE CASE

The issue in this case does not involve the legality of industry funds. This case does not involve the legality of multi-employer bargaining. What the case does involve is a union's agreement with a trade association to secure contributions from the association's competitors for the use of the association so as to eliminate the competitive advantage of non-members. The agreement on its face raises prices and interferes with price competition. The fund, whether or not labeled an "industry fund", is not so "intimately related to wages, hours and working conditions" as to justify insulation from the antitrust laws.[1] Thus, the case does not involve either the statutory or non-statutory labor exemption,[2] nor does it impinge upon or affect multi-employer collective bargaining.

Collective Bargaining Structure

The collective bargaining structure in the electrical construction industry is dominated by the IBEW and NECA. This structure existed prior to the agreement at issue in this case and was used to insure the success of that agreement.

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[1] The defendant's position before the district court was that the fund at issue in this case was a concession to management. R at 1336 ["R" refers to the printed Joint Appendix in the United States Court of Appeals for the Fourth Circuit]. Industry funds have expressly been held not to be "intimately related to wages, hours and working conditions" as being essentially outside of the employment relationship. National Labor Relations Board v. Sheet Metal Workers, 575 F.2d 394 (2nd Cir. 1978); National Labor Relations Board v. Local 264, Laborers, 529 F.2d 778 (8th Cir. 1976); National Labor Relations Board v. Detroit Resilient Floor Decorators Local 2265, 136 NLRB 769, 771 (1962) *Enforced*, 317 F.2d 269 (6th Cir. 1963).

[2] These issues were not raised by Petitioners before the Fourth Circuit. *See, Infra*, Argument F.

NECA is the largest trade association in the industry, and consists of a national corporation and local chapters. Its members are both union and *non-union* electrical contractors.[3] The chapters are organized in regional territories throughout the country, which coincide with the jurisdictions of one or more IBEW local unions. R at 2175. NECA is the only employer association in the electrical industry with which the IBEW bargains on a nationwide basis and NECA bargains only with the IBEW. R-94-95, 254, 338-39. The plaintiffs, with the exception of Foley and Commonwealth, are barred from NECA membership.[4]

Committees of NECA chapter members represent their membership in multi-employer bargaining negotiations with IBEW local unions in the chapter's territory, and periodically negotiate collective bargaining agreements with those unions. Nonmembers have no right to be on these committees or to vote on the collective bargaining agreement.[5] These agreements negotiated by NECA and IBEW are known as "local agreements" or "working agreements". Although the IBEW negotiates with a few other local contractor associations, the overwhelming majority of Local Agreements are the result of bargaining between local unions and local NECA chapters. Most of these contain "most favored nations" clauses, which obligate the IBEW to grant to the parties to the agreement the benefits of any agreement entered into by the union and another employer in the same jurisdiction.[6]

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[3] Plaintiffs and Class members are union contractors.

[4] NECA limits its membership to contractors whose principal business is electrical contracting. General contractors who hire electrical workers are barred from membership because they perform construction work in several crafts in addition to electrical construction. R at 248-51; 305-06; 715-16.

[5] R at 1071; 1881-83; 2074; 2077-80; 2076-99; 2100-03.

[6] R at 329; 1240. For typical language of these clauses see R at 1355.

Once the Local Agreement is negotiated it has been the IBEW's policy and practice for many years to secure from contractors letters of assent which bind the contractor to the terms of the NECA chapter-IBEW Local Agreement for the area in which the contractor wishes to work.[7] A second method by which a contractor enters into an agreement with the IBEW is by signing an International Agreement. This is a standard form agreement issued by the IBEW to some general contractors who perform work at different sites across the country. It is in effect a nationwide letter of assent which binds the signatory to the terms and conditions of the Local Agreement for any geographic area in which the general contractor wishes to hire IBEW labor.[8] A third means of negotiating with the IBEW is by signing a Project Agreement. A Project Agreement is designed to cover a single construction project. The IBEW seeks to procure the terms of the Local Agreement in any Project Agreement.[9]

It is very unusual for the IBEW to negotiate an independent agreement with a single contractor. The scenario of bargaining was explained by IBEW International President Farnan as involving the union giving a contractor a letter of assent. If the contractor refused to sign the assent, it was "not normal" for the union to sign or negotiate a separate agreement other than an assent.[10] • • • •

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[7] R-2175. The overwhelming majority of contractors seeking IBEW labor sign letters of assent. Letters of assent are non-negotiable standard form agreements prepared by the IBEW.

[8] R at 2176. Similar to letters of assent it is for all practical purposes non-negotiable. R-1725-28.

[9] R-2176. Generally a Project Agreement is negotiated with the Building Trades' Council in the area since it covers all crafts and is used only on large industrial projects. The IBEW seeks to procure the terms of Local Agreements, including the NEIF, in Project Agreements. R-3341-42; 351-52; 1261-74.

[10] R-335-36; 394-402; 1164. The policy of requiring Assents is very well known in the industry. R-332-34; 401-02.

As of December, 1976, six months before the implementation of the agreement at issue in this case, the vast majority of contractors in the electrical construction industry procured IBEW labor under the terms and conditions of the Local NECA Chapter—Local IBEW Union Local Agreements, either as members of local NECA chapters or as signatories to Letters of Assent or International Agreements.[11]

NECA Dues Structure Prior To The National Agreement

Prior to the negotiation of the National Agreement,[12] NECA members paid dues in the amount of $50.00 per year plus a service charge of up to 1% of their productive labor payroll, 20% of which went to NECA National with the balance retained in the local chapter. R at 719-20. Non-NECA contractors did not have these dues obligations. In collateral litigation filed by NECA to collect payments from plaintiffs who resisted paying into the NEIF, NECA officials filed affidavits stating:

> Over the years of my association with the electrical contracting industry, I have frequently seen situations where the difference between a successful bid for a contract and the next lowest bid was much less than 1% of the successful contractor's anticipated payroll expenses for the product. This is because ma-

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[11] R-2176.

[12] The agreement at issue in this case. The title of the agreement at issue is merely "Agreement" and in these proceedings has been colloquially referred to as the "National Agreement". The term "National Collective Bargaining Agreement" as used in the NECA petition is an appellation conjured for purposes of appeal. The agreement is not a collective bargaining agreement in the legal sense since the National NECA Corporation and the International Office of the IBEW have not been designated as bargaining agents for anyone. Letters of Assent "A" authorize only the local NECA chapter to be a bargaining representative with the local IBEW union. Letter of Assent "B" adopt the terms of the local agreement but do not designate any bargaining agent. App.-4a [All appendix references are to the appendix to the NECA Petition unless otherwise indicated]. *IBEW* Petition at n.2.

terial and labor costs vary little between competing contractors. If the Howard P. Foley Company and other contractors are permitted to evade payment of the 1% of their payroll costs to the NEIF, they will thus be placed in a highly unfair competitive position with respect to other contractors who continue to observe their contractual obligation in this regard. R-944; 950; 956-57, *quoted* in the District Court Opinion, *NECA* Appendix at 63a.[13]

The effect of the National Agreement was to cause all contractors in the industry to pay 1% of their payroll to NECA.[14]

The National Agreement And Memorandum of Understanding

In the Spring of 1976, the International Office of the IBEW and the NECA National Corporation tentatively

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[13] The importance of the 1% differential was further stated by counsel for the NEIF as follows:

> [Contractors who do not pay into the NEIF] are going to get an extra boost. *They are going to have to be able to be so competitively placed that they have an advantage over the local contractors, members of the local [NECA] chapter.* They will not have to pay pending all this litigation which can go on for years in Maryland. They will not have to pay one cent towards this fund which every other contractor here will have to pay.
>
> * * * *
>
> (Mr. Tobin) . . . That is exactly the point. In the interim [*the contractor refusing to pay*] *is getting a competitive advantage over everyone else. He, therefore, gets the bid. He can beat them out.* There is nothing that anybody can get from it thereafterwards. We are coming in here merely for his allowance. That is Number One.
>
> Number Two, and perhaps even more important, he doesn't pay his competitors—the hundreds and hundreds of other electrical contractors that are situated in Southern California—they see he gets away with that 1%. *That 1% is a big thing. App.* at 63a-64a (emphasis added).

[14] It is to be noted that plaintiff contractors also must pay to support their own trade association—a cost not shared by NECA contractors.

agreed to the agreement at issue in this case known as the "National Agreement".[15] In contrast to other provisions of the agreement, which are applicable only to agreements between local NECA chapters and IBEW local unions, Article Six of the agreement establishing the National Electrical Industry Fund (NEIF) expressly states that it should be placed in *all construction agreements in the industry.* To avoid any question as to the meaning of their agreement the parties executed another document entitled "Understanding and Interpretations of the IBEW-NECA Agreement". This document is not reproduced in the Appendix of any of the Petitioners in this case but is quoted in the District Court's Opinion. NECA App. at 55a. The agreement states that the intent of Article Six was to insert the Industry Fund provision into all IBEW construction agreements containing the NEBF language.[16] An affidavit filed in other litigation by the Administrative Assistant to the International President of the IBEW explained that the NEBF language is contained in all IBEW collective bargaining agreements.[17] All of the individuals involved in the creation of the National Agreement knew that the NEBF was in all constructions contracts in the electrical construction industry.[18] The intention to insert the requirement to contribute to the NEIF in all IBEW construction agreements is also reflected in many other contemporaneous documents and statements. See District Court Opinion, NECA App. at 55a-57a; 61a-64a.

Implementation Of The Agreement

While the manner of implementation of the Agreement at issue in this case is not relevant, it is instructive. On

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[15] The agreement is reproduced in the NECA Appendix at 173a.

[16] A reference to the National Electrical Benefit Fund, which had been in existence since 1947.

[17] The affidavit is quoted in the District Court Opinion NECA App. at 55a. As to the full text of the Memorandum of Understanding and Mr. Loftis' affidavit see R-1076-79 and R-1249.

[18] R-263-65; 361-65; 379-81.

December 16, 1976, the IBEW directed its locals to insert the provisions of the National Agreement into local agreements with NECA chapters. That directive also stated:

> You will be furnished, by separate letter, instructions for non-NECA chapter agreements and other chapter agreements with the 1% [NEBF] clause outside the construction industry.

R. at 1146.

The letter instruction from IBEW to its locals for non-NECA agreements was issued on December 28, 1976, and was addressed as follows:

> To: All Local Unions Who Have Agreements Containing The 1% NEBF Clause.

The letter of direction contained in part the following directive:

> For all agreements except the NECA chapter construction agreements, the Local Union is to notify ALL employers who have agreements with the Local Union which presently contain the 1% clause and request that the agreement be opened by mutual consent to include the applicable sections in the agreement; specifically:
>
> FOR ALL NON-NECA INSIDE AND OUTSIDE CONSTRUCTION AMENDMENTS
>
> • • • •
>
> Article VI—Industry Fund. This is to be inserted in all inside and outside construction agreements.

R. at 781.

Contractors who were not members of NECA but who had previously assented to a local agreement prior to the creation of the NEIF were advised that they were now obligated to make payments. Since the IBEW procured agreements assenting to the terms and conditions of the local NECA-IBEW agreement from the vast majority of contractors in the electrical industry who are not members of NECA, the National Agreement was effective

solely through the changing of the local agreements. *IBEW Petition* at 7. By amending these agreements, the Petitioners placed an additional cost burden on these contractors without regard to later efforts to secure additional assents or to place the NEIF in other collective bargaining agreements in the electrical construction industry.

As to assents executed after the date of the National Agreement the IBEW, pursuant to their agreement with NECA, had the contractor execute a letter of assent which adopted the local NECA chapter-IBEW local agreement which included the NEIF provisions. Where a contractor attempted to exclude from the assent the requirement to pay into the NEIF, the IBEW refused to allow the exclusion.[19] Where a contractor refused to accept an assent letter which did not exclude the NEIF, IBEW President Pillard instructed his local unions that they could not bargain to impasse since the NEIF was a nonmandatory subject of bargaining but they could bargain for items equal to or in excess of 1% in an independent agreement.[20] Nine months after the issuance of President Pillard's instructions, International Vice President Moore wrote the following to an IBEW business manager in connection with a negotiation where a contractor had attempted to exclude the NEIF under a letter of assent:

> Please notify Donovan Construction Company that you cannot accept an altered letter of assent. They must sign a standard unmodified Letter of Assent 'B' or Letter of Assent 'A', or you will sit down and negotiate a separate agreement with them. However, in that agreement be sure and ask for considerably above your present wage rate and add all kinds of fringe benefits to your request. After they receive your request, they will be more than happy to receive a standard Letter of Assent. R-1237.

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[19] R-1222-24.

[20] R-777-79; 1166-77; 1237; 1241-42.

In implementing the instructions of President Pillard, Commonwealth Electric Company was notified by an IBEW business manager that the NEIF was an economic accommodation on the part of IBEW which lessened employers' ability to increase benefits for IBEW members. Therefore, when an employer did not pay the NEIF it allowed the IBEW to achieve increased benefits without subjecting the employer to a "competitive disadvantage against their NEIF contributing counterparts."[21] As a result, as of June 1978, well over 90% of the contractors in the industry had executed letters of assent adopting agreements including the NEIF. For those who refused, the negotiation of substitute payments equaling the 1% became commonplace. An example of negotiation of substitute payments is correspondence reflecting the pattern of negotiations between Local Union 1249 and a contractors' association known as the New York State Line Construction Contractors, Inc., which is not associated with NECA. The agreement negotiated did not include the NEIF but expressly in its place called for the employer to contribute an additional three-quarters of 1% into the local union's training fund and a quarter of 1% into the apprentice program. The correspondence reflects it was a clear substitution for the NEIF.[22] The "most favored nations clause" was viewed by some local unions as requiring the negotiation of substitutes for the fund so as to equalize non-NECA contractors' costs.[23]

Administration And Use Of NEIF Funds

The NEIF is structured so as to be within the total control of the National Electrical Contractors Association

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[21] R-1238-39.

[22] R at 1231-34. The Petitioner's mention some 800 assents which did not have the NEIF, including certain contracts held by the Foley Company. This is not material to the application of the antitrust laws, particularly considering the existence of in excess of 12,000 assents by non-NECA contractors who are obligated to pay the NEIF. Moreover, many of these agreements, if not all, contained substitutes for the NEIF.

[23] R-1240.

and its local chapters. It is in fact structured so as to be merely a part of these organizations and a conduit for funds. The NECA National Executive Committee appointed itself as trustees with the Collection Agents being the local chapter business managers.[24] Funds are received initially by the local NECA collection agent who forwards an amount equal to .2 of 1% of the contributing company's labor payroll to the National Office of NECA, and retains the balance. The trust recites twelve broad purposes for the funds which are viewed by NECA as allowing payment of all NECA expenses with the exception of purely social activities.[25] NEIF monies are used to pay over 90% of the operating expenses of NECA National and its chapters.[26] None of these monies are paid to IBEW members and the IBEW does not participate in

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[24] R-508.

[25] R at 1068-75; 2104-12. Chapter dinner meetings, golf outings, and even lunches for women associated with the NECA are reimbursable from NEIF if they are deemed to have some relationship to NECA's business. R at 639-43; 646; 1068-75. The NEIF also pays for NECA National and Regional conventions. It is also used for recruitment of NECA members, training of chapter managers, NECA dues in other trade associations in which NECA is a member, liability insurance, retirement plans, and marketing service programs to aid members in increasing their share of the electrical contracting market. R at 274-78; 494-96; 499-502; 634-35; 638; 643-50. The NEIF was, of course, also used to pay the cost of this litigation. R. at 488. It is used to pay for studies supporting the view that owners should let electrical contracts directly to electrical specialty contractors, rather than to allow general contractors to perform electrical work. R at 1959-65; 1969-75. This is, of course, against the interest of many of the plaintiffs.

[26] NECA National's budget for 1978 reflected estimated expenditures of $4,730,494 of which NEIF would pay $4,648,133. For 1979, NECA's budget called for expenditures of $5,704,550 of which the NEIF would pay $5,500,882. R at 1976-96. (also giving itemized breakdowns of expenditures with the figures for 1978 being based on actual expenditures and reimbursements with the exception that the December figures were not final.) This document also contains written descriptions of the various major NECA budget items. Insofar as local NECA chapters are concerned, a large sampling of chapter financial statements showing the relation of NEIF dis-

the administration of the trust. NECA has been in existence since 1901 and has operated successfully without the benefits of a trade association promotion fund since that time.[27] Its officials testified that it had no financial difficulty prior to the institution of the agreement at issue and that NECA's financial condition at that time was excellent.[28]

As might be expected, NECA collected more in revenues than it could spend. In the first eighteen months of operation the fund showed a surplus of almost three million dollars,[29] notwithstanding directives from NECA to its chapters that they should budget their expenditures to insure that all monies collected were spent.[30] During 1979, NECA at the national level was accumulating surpluses at the rate of approximately $700,000 per year, and as a result distributed a million dollars of surplus to the chapters as well as issuing directives to them "to avoid the accumlation of significant NEIF surpluses".[31]

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bursements to chapter expenses are contained as Exhibits to depositions of Bertke, Devish, Bader, Cates, Hinote, Ostrow, Stroupe and Losh. Samples are contained in R at 1884-1956; 2017-56; 2081-95. *See* NECA National budget documents at R-1976-96. Local chapter financial reports at 1884-1956; 2017-56; 2081-95.

[27] The Council on Industrial Relations mentioned by NECA in its Petition has existed since 1921. As indicated in NECA's Petition, only NECA and IBEW representatives sit on that council and membership is restricted to NECA and IBEW members. The Council was used by the defendants as an instrument to implement their conspiracy by requiring NEIF payments from dissident contractors. With regard to training, all contractors, regardless of NECA membership, pay into training funds for the training of IBEW workers. The Injunction issued in this case does not affect these payments and they have continued.

[28] R-651, 577-78; 2113; 2118-19.

[29] R-504. For an example of accumulation of surpluses in a chapter see R-2066-73.

[30] R-527.

[31] R-1966-68; 1997-2016.

NEIF is NECA's alter ego, with its funds controlled and expended by the same individuals. Acting as NECA officials, they submit NECA's expenses to the NEIF for funding, and then, switching hats and acting as NEIF officials, they review the requests, approve them and release the funds to NECA.[32] There is no certified audit at either the local level or national level. The NEIF has no employees as its functions are performed by NECA employees. NECA and the NEIF occupy the same offices in Bethesda, Maryland. NECA has no offices, signs or other indicia differentiating NEIF from NECA.

As can be seen from the budget documents and local chapter financial reports that are in the record, the amount of NEIF monies spent on labor relations is extremely small in relation to total expenditures.[33] *See also, NECA Petition* at 5.

III

ARGUMENT

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR REVIEW ON WRIT OF CERTIORARI

The courts below, consistent with the prior decisions of this Court, have ruled that the antitrust laws prohibit a group of businessmen (NECA) from combining with a union (IBEW) to raise the costs paid by the group's competitors (plaintiffs and class members), which costs relate to the group members' costs of belonging to a trade association. Contractors who are members of NECA, and plaintiffs and class members are competitors in the electrical construction industry. Prior to the defendants' scheme, NECA contractors paid 1% of their electrical

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[32] R-244-47; 489-93.

[33] The National NECA budget documents reflect that of $10,149,015.00 collected from NEIF at the national level only $868,306 was spent on labor relations. R-1976. At the local level the percentage spent on labor relations is generally even less. R-1884-1956; 2017-56.

payroll to NECA as part of their NECA dues. With the defendants' National Agreement, "all construction agreements in the electrical industry" were to contain a clause requiring payment of 1% of the employers' gross electrical payroll into the NEIF, the alter ego of NECA. The 1% NEIF surcharge replaced the 1% NECA dues obligation previously borne by NECA contractors. This charge became an additional expense for contractors who chose not to belong to NECA.

Thus, an element of price competition between NECA contractors and plaintiffs and class members was eliminated, adding millions of dollars to plaintiffs and class members' costs. The beneficiaries of this equalization of costs were the NECA contractors who placed their competitors at a competitive disadvantage when competing against the NECA contractors,[34] and NECA, the recipient of the additional funds.[35] The parties damaged by the scheme were plaintiffs and class members, who pursuant to the agreement must pay tribute to NECA, and the American public, who eventually pay the millions of dollars in costs added to construction projects.

The elimination of price competition in this case clearly constitutes price fixing. As noted below by the Fourth Circuit, "(t)o be guilty of price fixing, the conspirators do not have to adopt a rigid price, substantially less has been found to be price fixing. An activity can violate the *per se* rule even if its effect upon prices is indirect."

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[34] The importance of the 1% differential was sworn to by NECA chapter managers and NEIF collection agents in affidavits filed in proceedings to collect the NEIF from non-NECA contractors. These affidavits, quoted *supra*, noted that the 1% differential prior to the National Agreement was "frequently . . . the difference between a successful bid for a contract and the next lowest bid . . . ." The importance of the 1% differential was further stated by counsel for the NEIF. See n.13, *supra*.

[35] Although the funds were technically paid into the NEIF, as noted previously, the NEIF is the alter ego of NECA and NEIF monies are used to pay virtually all of NECA's expenses.

NECA App. at 14a. Concerted action which eliminates an element of price competition between competitors has been condemned as price fixing, a *per se* restraint of trade. In *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), this Court noted that an agreement to eliminate credit sales extinguished one form of competition among sellers, *id.* at 649, and held the arrangement to be a *per se* unreasonable restraint of trade. *Id.* at 650. In *United States v. General Motors, Inc.*, 384 U.S. 127 (1966), this Court held that an agreement between General Motors and some of its dealers to eliminate sales to dealers who sold to discounters was both a boycott and *per se* illegal price fixing. As found by the Court, a restraint upon "real or apparent price competition" between competitors is "unlawful *per se* when sought to be effected by combination of conspiracy." *Id.* at 147. As stated by the Court, "[t]he protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws." *Id.* at 148.

The fact that one of the conspirators in this case was a union and that the defendants effected the elimination of price competition by agreeing to place the restraint in collective bargaining agreements[36] does not transform the *per se* price fixing into some nebulous restraint that must be judged under the rule of reason. The IBEW's

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[36] The Defendants in their Petitions give the impression that the National Agreement itself was a collective bargaining agreement and the National NECA was somehow representing a multi-employer bargaining unit that included plaintiffs and class members. This is simply untrue. The National Agreement concerned what the defendants desired to go into the collective bargaining agreements between the local unions and the employers. While the scope of most of the clauses in the National Agreement were confined to the local union—local NECA chapter agreements, Article Six providing for the NEIF contribution was to be placed in "all construction agreements in the electrical industry." NECA National was never designated by any plaintiff or class of member as their bargaining representative.

role in this scheme was completely removed from the union's purpose of bettering the lot of union electricans. The union, employing the awesome power granted to it under the labor laws, was nothing more than the "muscle" used by the NECA contractors to require contractors who were not members of NECA to pay the same costs as NECA contractors.[37] Conceptually, the IBEW's role in the instant case mirrors the role played by General Motors in *United States v. General Motors, supra*; that is, a dominant force dealt with by all competitors that interfered with price competition between the competitors. Since at least *Allen Bradley Company v. Local Union No. 3, IBEW*, 325 U.S. 797 (1945), it has been clear that the labor laws do not permit, and the antitrust laws forbid, a union from interfering with competition between employers over matters that do not relate to the wages, hours, and working conditions of union members. Even where the union is aiding an employers association in seeking to spread the costs of bargaining with the union, the Court has held that such an endeavor is not protected by labor law or policy, but is anticompetitive.

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[37] The NECA defendants devote a section of their petition at 15-19 to reiterating the NLRB finding that the union did not violate labor laws by bargaining to impasse with non-NECA contractors over the NEIF. As found by the NLRB's general counsel, however, the union's policy was *at least* to request the NEIF from non-NECA contractors during negotiations. *NECA* Petition at 15. As shown by the undisputed evidence below, where an employer refused to accept the NEIF, the union obtained a substitute provision to secure the 1% surcharge. See, text accompanying notes 21-23, *supra*. While coercion may be an element to a labor law violation, it is not a required element of a price fixing violation. Even assuming that the union never coerced a contractor into accepting the NEIF provision, and assuming that in some cases the union was unable even to obtain a substitute, this only means that in a few instances the defendants' scheme to eliminate price competition was unsuccessful. It does not change the fact that where the union requested the NEIF or a substitute pursuant to the National Agreement, and obtained such a provision, price competition was eliminated. It is well settled that a price fixing conspiracy need not be 100% effective to be condemned as illegal.

Federal Maritime Commission v. Pacific Maritime Association, 435 U.S. 40 (1978).

That the tools used to implement the restraint were collective bargaining agreements with the local unions does not change the application of the antitrust laws to this case. A collective bargaining agreement is the mechanism through which labor unions act. The object of the restraint, the NEIF, although contained in the local collective bargaining agreements, has no relationship to the wages, hours or working conditions of IBEW members. Union members do not see one penny of the money collected by the NEIF. It is all transmitted to NECA. To the extent that the defendants extol the virtues of the NECA services paid for by the NEIF, this is nothing more than the type of justification claimed by price fixers in every case. The benefits the defendants claim, even if true, are legally irrelevant. See *Arizona v. Maricopa County Medical Society*, 102 S.Ct. 2466, 2477-79 (1982); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978).

The defendants have filed two Petitions for Certiorari. Defendants' contentions that the decisions below conflict with decisions of other circuits or this Court's decisions are illusory. A fair reading of the two opinions below show that they are based on fundamental principles of antitrust law and in fact explore no new ground.

A. There Is No Holding In The Instant Case That Collective Bargaining Agreements Which Contain An Industry Fund Provision Are Illegal

First, the NECA defendants suggest that the Fourth Circuit's opinion is a case of first impression that would outlaw all collective bargaining agreements that contain an industry fund provision. *NECA* Petition at 12-14. Only by ascribing to the Fourth Circuit's opinion a holding that does not appear therein do the defendants create their issue of "first impression." NECA Petition at 12. Neither court below held that industry funds are illegal

or that agreements providing for industry funds are illegal. What was condemned in this case was the defendants' agreement which required "[a]ll construction agreements in the electrical industry" to contain language requiring an employer of IBEW members to contribute to NECA. The industry fund, which is the alter ego of NECA, is merely the recipient of the scheme to equalize costs. Rather than benefiting themselves, if the NECA defendants had chosen a charitable organization as the beneficiary of their scheme to equalize price competition, the result in the instant case would be the same. The charity would not be illegal. In short, it is the agreement to equalize costs by using the NEIF as the method which is illegal, not the NEIF itself.

B. An Agreement to Equalize The Costs of Belonging To A Trade Association Is Price Fixing In A Commercial Market Irrespective Of Whether There Is Direct Proof That The Costs Were Passed On

Both petitions filed by defendants urge that certiorari be granted because the courts below impermissibly expand the *per se* rule to include price fixing where there was no direct proof that the increase in plaintiffs' and class members' costs brought about by the defendants' scheme was passed on by plaintiffs and class members to their customers. *IBEW Petition* at 21-24; *NECA Petition* at 19-22. NECA argues that without such a showing, there can be no finding of an effect on commercial competition.

Where an agreement interferes with price competition between competitors, it is *per se* an unreasonable restraint of trade, even if the effect upon prices is indirect. *Catalano, supra*, 446 U.S. at 647; *United States v. General Motors, supra*, 384 U.S. at 147-48. See also *National Society of Professional Engineers v. United States*, 435 U.S. 679, 690 (1978). Even if it is assumed that non-NECA contractors absorbed the additional costs represented by NEIF payments, this is immaterial. As noted

by this Court in *Catalano*, "the fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful *per se*." 446 U.S. at 649. Similarly, whether or not non-NECA contractors passed on the additional costs represented by the NEIF is immaterial. *Hanover Shoe, Inc. v. United Shoe Machinery*, 392 U.S. 481 (1968). It is enough that the plaintiffs' costs were increased. At best, the defendants' contention appears to be a claim that the raise in costs represented by the NEIF was reasonable, a contention which is immaterial in a price fixing case. *United States v. Socony Vacuum*, 310 U.S. 150, 213. The point is that, "[a]ny combination which tampers with price structures is engaged in an unlawful activity . . . The [Sherman] Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference." 310 U.S. at 221. By tampering with the costs paid by non-NECA contractors, the defendants tampered with price structures, regardless of whether these costs were passed on or absorbed.

Similarly, whether or not these increased costs were passed on to plaintiffs' and class members' customers has no effect on the determination of whether the restraint affected commercial competition. The NECA defendants rely primarily on *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940) in contending that the courts below ignored the requirement that the restraint on competition fall on commercial competition. In *Apex Hosiery*, the Court, relying in part on § 6 of the Clayton Act (15 U.S.C. § 17), stated that restraints on competition *between employees* in the seeking of the same wages, hours or working conditions are restraints on the labor market and not within the Sherman Act's prohibition. *Id.* at 503-04. The Court noted that the restraint must fall on commercial competition and not on competition between employers concerning what they pay their employees. See also *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 622 (1975) ("[L]abor policy requires toler-

ance for the lessening of business competition based on differences in wages and working conditions").

In the instant case, however, the amounts to be paid by contractors to the NEIF have nothing to do with the wages, hours and working conditions of IBEW members. As such, the restraint is not visited upon competition in the labor market as it does not have anything to do with competition between NECA and non-NECA contractors concerning what they pay their employees in wages or fringe benefits. The price competition being restrained is that *between employers*; that is, what NECA contractors were paying to belong to NECA which was not being paid by non-NECA contractors.

Moreover, even if such proof were required, the effect of the scheme on prices is obvious. Further, when the defendants were trying to secure NEIF payments from non-NECA contractors, they admitted that the 1% increase would affect commercial competition. See text accompanying n.13 and n.13, *supra*. These admissions were quoted in the district court's opinion below. *NECA App.* at 61a-64a.

C. The Restraint Has No Relationship To The Elimination of "Free Riders"

The IBEW defendants contend that the decisions of the courts below finding their agreement illegal conflict with other judicial decisions that permit contracting parties to eliminate third parties from being "free riders." *IBEW Petition* at 18-21. Similarly, the NECA defendants argue that the Fourth Circuit's opinion disregards the benefits conferred by the NEIF and ignores the elimination of "free riders" as a permissible purpose. *NECA Petition* at 13-14.

The "free rider" argument is premised on the proposition that non-NECA contractors receive specific "services" from the local NECA chapters in that the chapters negotiate and administer the collective bargaining agreements with the local unions. Therefore, according to the defendants, the opinions below eliminate the rights of

such persons to insist upon payment when the services are used by third parties.

The undisputed evidence shows, however, that the 1% surcharge agreed upon by the defendants has no relationship to any costs incurred by NECA chapters in negotiating with the local unions or administering the collective bargaining agreements. See note 33, *supra*. Indeed, this is recognized by the NECA defendants in their Petition to this Court:

> The Fund was intended as something more than a mechanism through which NECA and non-NECA contractors could pay their fair share of the expenses of negotiating and administering industry collective bargaining agreements and other similar services. It also intended to increase the funds available to improve the quantity and quality of the services which NECA provided the entire electrical construction industry.

NECA Petition at 5-6. The evidence shows that the 1% surcharge is related to the previous cost of NECA dues, and not to the costs of any services performed by the defendants for the plaintiffs and class members. The defendants seem unable to comprehend that plaintiffs and class members do not want to belong to NECA and pay NECA dues.

Further, the "free rider" argument falls flat on its face in view of the scope of the defendants' illegal agreement. The agreement applied to "all construction agreements in the electrical industry", not just those that were negotiated and administered by NECA. Nowhere do the defendants attempt to explain how non-NECA contractors who were not parties to a local NECA chapter agreement were "free riders". In short, the "free rider" argument is a "catch phrase" justification fabricated after the agreement which is simply unsupported in the record.[38]

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[38] Every employer bargaining group desires that a union offer no better terms or conditions to non-members of the group. This is the reason for the "most favored nations" clause. It is clear that NECA does not intend to provide any benefits to non-members.

Finally, the Court in *Federal Maritime Commission v. Pacific Maritime Association*, 435 U.S. 40 (1978) rejected the proposition that an employers' association together with a union may attempt to equalize non-members' costs with the costs incurred by the association in negotiating with the union. The agreement at issue in the case was between the Longshoremen's Union and PMA, an employers' association made up of union employers. Prior to that agreement, non-PMA employers secured their union work force from PMA-union hiring halls and made fringe benefits payments to funds maintained by PMA as a result of agreements with the union. Non-PMA employers did not pay PMA dues. PMA sought to eliminate the non-members "free ride", and the union and PMA placed a provision in their agreement by which the union agreed that non-members would pay the same dues and assessments as PMA members as a condition of using the hiring halls and paying into the fringe benefit funds. *Id.* at 47.

Several non-PMA employers filed a petition with the Maritime Commission claiming that the above-described agreement was subject to disapproval. Upon reaching this Court, the Court found that the labor exemption would not apply in light of the fact that the union had agreed to seek the terms from employers other than those who were members of PMA. *Id.* at 61.[39] The Court went on to agree with the Maritime Commission that an agreement to place PMA employers and non-PMA employers on the same competitive basis with regard to PMA dues was anticompetitive. *Id.* at 62-63. This is precisely the same situation in the instant case.

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[39] The labor exemption to the antitrust laws also applies to the Shipping Act, although it is not necessarily "always exactly congruent." 435 U.S. at 52; 60-63.

D. The Decisions Below Do Not Conflict With The Court's Decision In *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) ("CBS")

The IBEW defendants contend that certiorari should be granted to resolve the conflict between the decisions below and the Court's holding in *CBS*. *IBEW Petition* at 13-18. The alleged conflict does not exist.

The contention in *CBS* was that the composers of musical compositions through their associations, ASCAP or BMI, had combined to fix the price of their compositions by requiring a licensee such as the plaintiff, CBS, to purchase a blanket license to use all of the compositions. CBS desired the right to purchase a limited license for the use of specific compositions. The Court held that the composers were trying to protect the rights granted to them by the copyright laws and a blanket license was merely a method to market a unique product. See also, *Arizona v. Maricopa County Medical Society*, 102 S.Ct. 2466, 2479-80 (1982).

Here, the basis of the decision below is that the union combined with NECA to raise the prices paid by another group of competitors. In *CBS*, there was no allegation that the composers or ASCAP or BMI had combined with the *competitors* of CBS to raise CBS' prices. In the instant case, the IBEW agreed with plaintiffs' and class members' competitors to attempt to secure the 1% surcharge. This basic difference renders the *CBS* case inapposite.

E. There Is No Basis For Judging The Restraint In The Instant Case Under The Rule Of Reason Merely Because A Union Is A Party To The Agreement

The NECA defendants request the Court to grant certiorari to rule upon whether a restraint of trade involving a union can be subject to the *per se* rule. *NECA Petition* at 22-24. The defendants maintain that other circuits, as well as this Court in *Connell Construction*

Co. v. Plumbers & Steamfitters, Local Union 100, 421 U.S. 616 (1975), have held that the *per se* rule cannot apply to a collective bargaining agreement. It is most important to note that the IBEW does not join in requesting the Court to take certiorari on this point.

The first of several flaws in the defendants' position is their statement that the restraint of trade in the instant case emerged out of a collective bargaining agreement. The National Agreement was not a collective bargaining agreement. At best, it was a side agreement between the union and National NECA as to what would go into collective bargaining agreements negotiated by the local unions and local NECA chapters.

Further, even assuming the restraint was in a collective bargaining agreement, there is no basis to carve a third exemption to the antitrust laws for a labor union. There is a basic conflict between the labor laws and the antitrust laws. The design of the labor laws is to authorize the formation of unions to obtain uniformity of labor standards, thereby eliminating competition between workers concerning conditions of employment. The design of the antitrust laws is to promote competition. *H.A. Artists & Associates, Inc. v. Actors' Equity Association*, 101 S.Ct. 2102, 2108 (1981). The conflict is resolved by application of the statutory and nonstatutory exemptions to the antitrust laws. Where a union acts to eliminate competition between employers regarding workers' conditions of employment, the union is exempt from application of the antitrust laws under the statutory exemption if it acts alone, and under the nonstatutory exemption if the restraint is "intimately related to the union's vital concerns of wages, hours and working conditions." *Id.* at 2109-10 n. 19.

The labor movement in this country need not fear undue application of the antitrust laws as long as the restraint of trade at issue in a case involves labor's legitimate concerns. The opinions below clearly recognize this

distinction. As found by the courts below, where the union has moved beyond its legitimate concerns and is a party to a restraint on price competition between employers concerning what the employers decide to pay a trade association, the union is no longer furthering its own purposes but instead is interfering in the open and free competition between employers mandated by the antitrust laws. There is simply no reason to carve out another exemption to the antitrust laws where the union acts in such a manner. As long ago as *Allen Bradley Co. v. Electrical Workers Local No. 3, IBEW*, 325 U.S. 797 (1945), the Court stated:

> [W]e think Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services.
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> [I]f business groups, by combining with *labor unions can fix prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves.*

Id. at 808; 810 (emphasis added).

Further, the power afforded to unions by the labor laws is of such a nature that it would be counter productive to insulate them further from antitrust scrutiny. This Court recently recognized this power in the *Actors Equity* case, stating that "[l]abor unions are lawful combinations that serve the collective interests of workers, but they also possess the power to control the character of competition in an industry." 101 S.Ct. at 2108. Where, as in the instant case, the union is not acting to serve the collective interests of workers, but is instead abusing its powers to aid one group of employers against another group, it would be sheer folly to add to the union's powers.

Finally, the conflict alleged by the defendants is simply non-existent. Nowhere in *Connell* did the Court express

a desire to afford labor unions another escape from application of the antitrust laws. Nowhere in the three circuit court cases cited by the defendants, *Berman Enterprises, Inc. v. Local 333, Int'l Longshoremen's Ass'n*, 644 F.2d 930 (2d Cir. 1981); *Meat Cutters Local 576 v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979); and *Smitty Baker Coal Co. v. United Mine Workers*, 620 F.2d 416 (4th Cir. 1980), *cert. denied*, 449 U.S. 870 (1980), is it held or even stated that the *per se* rule would not apply because a union was involved. As best, those cases stand for the proposition that where a union is seeking a legitimate union goal, the anticompetitive effects and/or purpose of a restraint must be examined to determine if they outweigh the labor benefit, thereby forfeiting the nonstatutory exemption. See *Connell Construction Co., supra*, 421 U.S. at 625. Where the restraint does not involve the union seeking to better or protect its members' employment conditions, none of these cases indicate that price fixing would be judged under the rule of reason as opposed to the *per se* rule.

F. The Nonstatutory Labor Exemption Was Not Raised By The Defendants Before The Fourth Circuit And In Any Event Is Not Applicable

The IBEW defendants maintain that the nonstatutory exemption should apply to the restraint in the instant case. *IBEW Petition* at 24-26. The Court should deny certiorari on this issue because it was not raised by the defendants before the Fourth Circuit. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). Notwithstanding the failure to raise this issue on appeal, the Court should not grant certiorari because it is obvious that the nonstatutory exemption would not apply. As noted by the Court in *Actors' Equity*:

> Even where there are union agreements with nonlabor groups that may have the effect of sheltering the nonlabor groups from competition in product markets, the Court has recognized a "nonstatutory"

> exemption to shield such agreements *if they are intimately related to the union's vital concerns of wages, hours and working conditions.*

101 S.Ct. at 2110 n. 19 (emphasis added).

Here, the beneficiary of the restraint is an industry fund which is used to pay the expenses of a trade association. Industry funds have been held to be non-mandatory subjects of collective bargaining precisely because they are not related to workers' wages, hours and working conditions. *National Labor Relations Board v. Sheet Metal Workers*, 575 F.2d 394 (2d Cir. 1978); *National Labor Relations Board v. Local 264, Laborers*, 529 F.2d 778 (8th Cir. 1976). In the seminal case discussing industry funds and their place with regard to labor policy, the NLRB noted that "[a]n industry promotion fund seems to us to be *outside* of the employment relationship." *National Labor Relations Board v. Detroit Resilient Floor Decorators Local 2265*, 136 NLRB 769, 771 (1962), *enforced* 317 F.2d 269 (6th Cir. 1963) (emphasis added). The point is that the NEIF is not related to the wages, hours or working conditions of union members; *a fortiori* it is not intimately related. Thus, the exemption would not apply.[40]

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[40] The defendants seem to suggest that if the NEIF benefits the industry, it benefits the workers in the industry, thereby supplying a valid labor purpose. In *Detroit Resilient Floor Decorators*, cited above, the union made the same contention. It was rejected by the NLRB, however, on the basis that such a claim is speculative at best. Moreover, in arguing to the district court, the defendants position was that the NEIF provision was a concession to management. The issue to be considered in determining whether a given practice falls within the protection of the exemption is whether the practice relates to the wages, hours or working conditions of union members, not whether it furthers an industry. Under the defendants' theory, the beneficiary of their illegal scheme could be a charity such as United Way, which benefits the community and the workers in the community and therefore the union members. This would not, however, advance labor policy, and would not be related to wages or working conditions.

G. The Decisions Below Do Not Conflict With Any Labor Policy Concerning Multiemployer Bargaining

All of the defendants take the position that the Court should grant certiorari because the decisions below conflict with the national policy in favor of multiemployer bargaining. The IBEW defendants argue that the decisions below will have the effect of permitting members of a multiemployer bargaining unit to avoid unwanted obligations in a collective bargaining agreement. *IBEW Petition* at 26-28. The NECA defendants argue that labor law permits the proposal of non-mandatory subjects of bargaining such as the NEIF, and that the decision below conflicts with this principle to the extent that it did not require the plaintiffs to prove coercion on the part of the union. *NECA Petition* at 15-19.

Once again, the conflict posed by the defendant is illusory. Nowhere did either court below ever hold that a union or employer violates the antitrust laws by requesting the inclusion of an industry fund provision in a collective bargaining agreement. What the defendants conveniently ignore over and over again is that the restraint in this case was *not* the IBEW requesting the NEIF provision in collective bargaining agreements; it was the agreement between National NECA and the IBEW that the NEIF surcharge would be placed in "*all* construction agreements in the electrical industry." The union remains free to request from any employer any non-mandatory item, so long as it acts unilaterally. The Fourth Circuit went to great pains to explain that the injunction did not apply to situations where the union acted alone in requesting a specific item to be included in a collective bargaining agreement. NECA App. at 17a-18a.

There is no justification in the nation's labor laws for the agreement made by the defendants. In *United Mine Workers v. Pennington*, 381 U.S. 657, 666 (1965), Justice

White in his opinion for the Court expressly stated that neither labor law nor labor policy supports a union bargaining with one group about what it will seek from another group. Justice White, again writing for the Court in *Federal Maritime Commission v. Pacific Maritime Association*, *supra*, stated that the union went outside the scope of labor law or policy when it agreed with an employers' association to seek various items from employers not represented by the association. 435 U.S. at 62. See also *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164 (1971). To the extent that the instant case forbids a union's participation in a business group's scheme to cause a cost increase in the form of a payment by nonmember competitors to the business group, which payment is unrelated to any legitimate union concern, the decisions below comport with existing labor law that the union is not free to negotiate with one employer concerning the terms it will request from another.

IV

CONCLUSION

The facts of this case are not complicated. The Fourth Circuit's decision is straightforward and based on unquestioned precedent. This case does not blaze any new trails with regard to the principle that price fixing is illegal *per se*. Similar to every other price fixing case, it simply applies antitrust principles to the relevant facts. The facts are that about half of the union electrical contractors in this country are members of a trade association which made an agreement with the union under which the union agreed that it would secure for the use of the favored association a designated sum from nonmembers of the trade association. This sum equals the dues paid to the trade association by its members, thereby equalizing costs among competitors. This is simple, garden variety price fixing, just as surely as the facts in-

volved in every case from *Socony Vacuum to Maricopa County Medical Society* amounted to price fixing. Defendants' Petitions should be denied.

Respectfully submitted,

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